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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Petitioner,
v.
ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

When the Fourth Circuit panel handed down its decision, respondents hailed it as a maritime law landmark. *See Salvors Must Give Up Treasure*, USA Today, Aug. 28, 1992 at 6A. Now that Columbus-America seeks relief from the Court, respondents suddenly see the case as insignificant and factbound. Respondents' first impression was correct. The opinion below breaks with other circuits to create an admiralty law conflict of national significance. Respondents have offered no reason in their Opposition why the Court cannot or should not grant certiorari to resolve the important issue presented.

1. Respondents' half-hearted suggestion that the Court lacks jurisdiction because the court of appeals remanded for further proceedings is simply wrong. "As long as the jurisdiction of the court of appeals has properly been invoked and a timely petition for certiorari is filed, the

Supreme Court has jurisdiction to take the case whatever its status in the lower court." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 41 (6th ed. 1986) (citing *The Conqueror*, 166 U.S. 110, 113-14 (1897)). The court of appeals reversed the district court on a cleanly presented admiralty law issue that is directly raised here. The Court routinely grants certiorari to review important legal issues following court of appeals decisions ordering further proceedings on remand. *See, e.g., Denton v. Hernandez*, 112 S. Ct. 1728, 1732 (1992); *Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311, 1315-16 (1992); *County of Yakima v. Yakima Indian Nation*, 112 S. Ct. 683, 687 (1992).

No further proceedings on remand can alter the court of appeals' imposition of a *per se* rule against finding abandonment in any case where a purported owner appears. The insurance companies' assertion that Columbus-America's petition "seeks to make this Court a trier of fact" on the issue of ownership (Br. in Opp. 4), is a disingenuous attempt to confuse matters.[1] Columbus-America does not seek review of any holding with respect to ownership. On the contrary, the issue here is the court of appeals' reversal of the district court's determination that respondents *abandoned* any interest they "may have had" in the gold aboard the CENTRAL AMERICA. Pet.

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[1] Respondents similarly attempt to diminish the significance of the court of appeals' decision by saying Columbus-America may receive "by far the largest share" of the treasure on remand. Br. in Opp. 3 n.4. According to respondents, seeking this Court's review of the important maritime issue presented merely indicates Columbus-America's greedy desire to get even more of the treasure. In the district court, in contrast, respondents are vigorously arguing that the greatest award to which Columbus-America could possibly be entitled under the law of salvage, on any facts, is fifty percent. *See* Claimants-Underwriters' Brief in Opposition to the Plaintiff's Motion for an Interim Order 4 (filed Dec. 2, 1992); *see also Treasure Hunters May Not be Able to Keep Bounty, Court Rules*, Wall Street Journal, Aug. 28, 1992 at B6 (statement by respondents' counsel of record that normally a salvage award "doesn't exceed 50%").

App. 102a. Respondents' own statements elsewhere in its brief acknowledge the nature of the single *legal* issue presented. Br. in Opp. 3 ("To succeed, CADG would re-write the law governing recovered property lost at sea by applying the law of finds.")

Respondents' brief studiously avoids Columbus-America's point—that the court of appeals *should* have allowed the case to be decided on examination of all the facts and circumstances indicating abandonment in accordance with established law. Instead, the court of appeals announced an ironclad rule that no abandonment can be found, and that salvage law must apply, any time a purported owner appears.[2] Under the court of appeals' rule, only an "express declaration abandoning title" can suffice to prove abandonment where a party claiming ownership appears. Pet. App. 27a. Respondents repeatedly refer to this rule as though it were hornbook law, yet in support they offer either a citation to the opinion below, or no citation at all. *See* Br. in Opp. 5, 6, 7.[3] It is the court of appeals' legal rule governing abandonment—not a factual determination —that is at issue here.

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[2] Respondents' objection to Columbus-America's use of the term "purported owner" is curious since the panel majority itself stated that salvage law must be applied whenever parties "who *intend to assert* a claim of ownership" appear. Pet. App. 21a (emphasis added).

[3] Respondents have attempted to bolster the court of appeals' strict rule against finding abandonment with irrelevant citations to criminal search and seizure cases, *United States v. Robinson*, 430 F.2d 1141, 1143 (6th Cir. 1970), and cases involving government property, *Hoelzer v. City of Stamford*, 722 F. Supp. 1106 (S.D.N.Y. 1989), *aff'd*, 933 F.2d 1131 (2d Cir. 1991). This may not be coincidental, for as petitioner has pointed out, the rule adopted by the Fourth Circuit is essentially the requirement of express abandonment that courts have traditionally applied only to *government* property such as warships. *See* Pet. 12 (discussing *United States v. Steinmetz*, 973 F.2d 212 (3d Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3452 (U.S. Nov. 18, 1992) (No. 92-859)); Lohrey, *Sunken Vessels, Their Cargoes, and the Casual Salvor*, JAG Journal 25, 27, 29 (July-Aug. 1965).

2. Respondents simply repeat the panel majority's assertion that there is no conflict among the courts of appeals because in other cases applying finds law no owner has appeared. *See* Br. in Opp. 4. Yet respondents offer no explanation for the fact that nothing in those decisions indicates that the failure of an owner to appear was dispositive. *See* Pet. 16. Respondents similarly offer no response to Columbus-America's observation that the Fourth Circuit and the other courts of appeals to address the law applicable to long-lost shipwrecks will plainly reach different results on the same facts. *See* Pet. 16-17. Respondents are unable to explain away circuit court cases where application of the law of finds was critical in resolving ownership battles between discoverers and the government. *See Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985) ("The common law of finds is the appropriate law to examine to determine the ownership of the shipwreck."); *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978) (law of finds is "correctly applied" to long-lost shipwrecks). Finally, respondents say nothing whatever about the state supreme court cases squarely stating that abandonment may be found as against an *owner*. *See* Pet. 16 (discussing *Wyman v. Hurlburt*, 12 Ohio 81 (1843), and *Eads v. Brazleton*, 22 Ark. 499 (1861)).[4]

Respondents' formalistic contention that courts are not in conflict over the application of finds or salvage law to long-lost shipwrecks is at odds with what has been said by the courts themselves. The First Circuit, for example, observed that the "better-reasoned authorities" agree that finds law should be utilized. *Martha's Vineyard Scuba Headquarters v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987). Leading commentators—in the course of endorsing the appli-

[4] *See also Howard v. Sharlin*, 61 So.2d 181 (Fla. 1952); *Steinbraker v. Crouse*, 182 A. 448 (Md. 1936).

cation of finds law to long-lost wrecks—have also noted the conflict in the cases. *See* 3A M. Norris, *Benedict on Admiralty* § 158 (7th ed. 1993); T. Schoenbaum, *Admiralty and Maritime Law* § 15-7 (1987); Edelman, *Who Gets Treasure Recovered From Sea?*, N.Y.L.J., Dec. 4, 1992 at 3, 4 (conflict will "need resolution by the Supreme Court"); Giesecke, *To Be or Not to Be Abandoned*, Sea Technology, Jan. 1993 at 93 (decision below "departs from established legal precedent defining abandoned shipwrecks" on the basis of "passage of time and the failure to retain records or make attempts at recovery").

The interest in the international uniformity of admiralty law cited by respondents only highlights the need for the Court's attention. Respondents assert that English law imposes the same rule of express abandonment adopted by the court of appeals below. Br. in Opp. 9. But as pointed out by *amicus*, The Explorers Club, the controlling British precedent actually holds that a wreck's contents may be *presumed abandoned* from the passage of time. *Pierce v. Bemis*, [1986] 2 W.L.R. 501 (Q.B. 1985). The British presumption of abandonment is the same rule stated by the First Circuit in *Martha's Vineyard*, 833 F.2d at 1064-65. It is the rule rejected by the opinion below. The uniformity of admiralty law, both national and international, as well as prevention of the widespread forum shopping that admiralty jurisdiction would otherwise allow, requires that certiorari be granted.

3. The importance of the legal issue raised here has been amply demonstrated in the many filings submitted to the Court. The development of new recovery methods has vastly multiplied the practical significance of this area of the law. *See generally Deepest Wrecks Now Visible to Undersea Cameras*, N.Y. Times, Feb. 2, 1993, at B1, B6 ("If upheld, experts say, the [court of appeals'] decision might spur clandestine recovery or reduce the overall levels of shipwreck hunting and photography.") The opinion below will not only chill private exploration efforts

but also adversely affect the interests of States and the federal government charged with administering historic shipwrecks under the Abandoned Shipwreck Act, 43 U.S.C. §§ 2101-2106. *See* Pet. 23. Respondents' contorted reading of the Act cannot avoid the fact that the court of appeals' dramatic change in the general maritime law definition of "abandoned," which the Act incorporates, will revive stale interests in (and generate endless litigation over) numerous historic wrecks previously considered abandoned and therefore subject to state and federal supervision.

Respondents contend that historic preservation and exploration are best served by the court of appeals' opinion. Br. in Opp. 9. But the participation here of the States and the numerous private organizations promoting exploration and historic preservation belies their claim. In respondents' view, the first task of undersea explorers should be to research the existence of corporate entities or their successors who (despite the passage of decades during which they made no effort at recovery) might assert a claim. Instead of treating a long-lost wreck as an integrated whole, respondents' approach would fracture historic shipwrecks into a multiplicity of property interests, each of which might be controlled by a different insurance carrier or descendant.

Contrary to respondents' statement that litigation could be "easily avoided" through commercial arrangements (Br. in Opp. 8 n.9), explorers would be required to negotiate with a multitude of purported owners. Before research and exploration could proceed, the parties undertaking the risk (and the investors on whom the explorers must rely) would have to agree to hand over a substantial percentage of any eventual recovery. The pernicious effects of such an approach on maritime exploration are obvious. Respondents' defense of the court of appeals' rule boils down to this: better that discoveries not be made at all than that indolent insurance companies' stale claims go unsatisfied.

The conflict created by the opinion below threatens both the uniformity of the law of admiralty and the viability of emerging deep sea exploration and recovery initiatives. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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